

Legal Update  
Delta Stewardship Council  
March 24, 2011

## **The Delta Smelt Cases**

On January 28, Plaintiffs filed a motion for injunctive relief and a hearing was scheduled for February 25<sup>th</sup>.

On February 25th, the parties were able to reach a temporary settlement agreement.

The agreement is for the limited purpose of resolving CVP and SWP operations through June 30, 2011.

The agreement establishes operating criteria for CVP and SWP and provides increased collaboration among the parties in drafting the revised BiOp. Maintains the same level of protection to the delta smelt that existed prior to the agreement, but allows for higher pumping output.

## **The Consolidated Salmon Cases**

Plaintiffs filed a motion for a preliminary injunction on February 4, 2011.

Seeking to enjoin the implementation of certain components of the National Marine Fisheries Service's (NMFS) RPA.

That hearing was scheduled for March 8, 2011 but will instead occur March 23 through March 25.

Plaintiffs also request a Temporary Restraining Order (TRO) enjoining implementation of components of the PRA that are scheduled to start April 1. The motion for TRO will be heard concurrently with the hearing related to Plaintiff's motion for preliminary injunction. The court will rule on the TRO at the end of the hearing on March 25.

## **Striped Bass Settlement**

On March 17, Judge Wanger said he would approve a settlement between the parties in the striped bass predation case.

The case was filed in 2008 by the coalition for a sustainable delta and other water users against the California Department of Fish and Game (DFG).

Claimed that DFG's regulations have ignored harm to native fish including the Delta smelt and salmon and have instead acted to bolster the striper population.

DFG has long been protecting the voracious predators at the expense of salmon, delta and longfin smelt, and other endangered species through the imposition of size (18 inches minimum) and bag (2 per day) limits.

The settlement will require that state and national fishery management agencies develop a proposal that will include:

- Appropriate changes to the DFG regulations.
- Development of an adaptive management plan to research and monitor the overall effects on listed species; and
- Creation of a research program focused on predation of protected species.

If there is disagreement, or if the state Fish and Game Commission does not implement the striped bass changes within 21 months of receiving a draft proposal, the agreement will be voided and the case will again move to trial.

### **State Lands Commission** (Bollay v. California Office of Administrative Law)

The court invalidated a State Lands Commission regulation that is one of the state's main tools for protecting the coast.

The regulation - prohibits development seaward of the most landward historical position of the mean high tide line.

The court held that the Commission failed to properly promulgate the policy as a regulation under the Administrative Procedure Act (APA.)

Unless it is subject to one of the enumerated exceptions, every regulation must be adopted consistent with the procedural requirements of the APA. This requires, among other things, public notice and an opportunity for public comment before the regulation takes effect.

The Commission's argument was that the policy was exempt from promulgation under the APA because it was just a reiteration of existing law and was "the only legally tenable interpretation of the existing law."

The Lands Commission argues that its policy is required because of its legal duty to protect the state's tidelands.

Under the "only legally tenable interpretation" exception, the state agency need not promulgate it pursuant to the APA if the regulation essentially reiterates the law. If the regulation departs from or embellishes upon the law, the state agency must comply with the APA.

The court found that the regulation was not a simply a reiteration of existing law because it departs from and embellishes upon the existing law.

## **ARB CEQA Case Finalized**

Last meeting I presented the tentative decision from ARB v. AIR.

The decision concluded that ARB failed to comply with CEQA in its adoption of the Scoping Plan for AB 32. The decision became final on March 18.

### **ARB violated CEQA in two ways:**

(1) It failed to adequately analyze alternatives to the scoping plan in the environmental review documents;

ARB must provide the public with some indication based on factual analysis as to why it chose the scoping plan over alternatives. ARB's analysis provides no evidence to support its approach even though such data was available.

(2)It impermissibly approved and implemented the scoping plan prior to completion of environmental review.

ARB approved and began implementing the scoping plan prior to completing its obligation to review and respond to public comments. The court treated a resolution adopted at a hearing in Dec. 2008 as initiating the Board's approval of the Scoping Plan, many months before the finalization of its CEQA review.

The ruling sets aside ARB's CEQA documentation and prohibits "any implementation of the Scoping Plan" until ARB corrects the CEQA violation.

### **ARB plans to appeal**